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Supreme Court, U.S.
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No. 04-705

IN THE

Supreme Court of the United States

TOMI WHITE BRYAN,

Petitioner,

v.

BELLSOUTH TELECOMMUNICATIONS, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether—consistent with the decision of every other circuit to address the question—the Fourth Circuit correctly determined that it had appellate jurisdiction to review the district court's order, pursuant to 28 U.S.C. § 1367(c)(3), declining to exercise supplemental jurisdiction over a state-law claim after it dismissed federal claims.

2. Whether the district court had federal-question jurisdiction because petitioner's state-law claim for unfair and deceptive trade practices, which challenged BellSouth's assessment of a charge set forth in its federal tariff, necessarily would require resolution of a substantial question of federal law.

3. Whether petitioner's state-law claim for unfair and deceptive trade practices, which seeks a refund of amounts paid pursuant to a charge set forth in BellSouth's federal tariff, is barred by the filed-rate doctrine.

RULE 29.6 STATEMENT

The parent corporation of BellSouth Telecommunications, Inc., is BellSouth Corporation, which is publicly held.

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INTRODUCTION

None of the three questions presented in the petition warrant review by this Court. Petitioner asserts that the Fourth Circuit erred in holding that it had appellate jurisdiction to review the district court's remand order, issued pursuant to 28 U.S.C. §1367(c)(3), but every other circuit to address the question has adopted the Fourth Circuit's position. Petitioner claims that the decision below created a circuit split with respect to the applicability of the complete preemption doctrine to the Federal Communications Act, but the Fourth Circuit expressly declined to rely on that doctrine, instead finding federal-question jurisdiction on other grounds—grounds not even challenged in the petition. Finally, petitioner contends that the Fourth Circuit improperly applied the filed-rate doctrine, but its decision is consistent both with this Court's precedents and with the decisions of the other circuits. Accordingly, the petition should be denied.

STATEMENT OF THE CASE

A. Regulatory Background.

As a provider of interstate telecommunications services, respondent BellSouth Telecommunications, Inc. ("BellSouth"), is subject to federal regulation as a common carrier under the Federal Communications Act ("FCA"), 47 U.S.C. § 151 *et seq.* With respect to the services at issue in this case, the FCA requires BellSouth to file with the Federal Communications Commission ("FCC") publicly available schedules, or "tariffs," setting forth all of its charges and the classifications, practices, and regulations affecting them. *Id.* § 203(a).

Moreover, the FCA mandates, among other things, that carriers contribute to the preservation and advancement of federal universal service support mechanisms, *id.* § 254, through the required payment of a percentage of their revenues to the federal Universal Service Fund ("USF"). See

In re Federal-State Joint Bd. on Universal Serv., Report & Order, 12 F.C.C.R. 8776, ¶¶ 842-44 (May 8, 1997). The purpose of the USF is to subsidize the cost of telecommunications services to schools, health-care providers, libraries, and rural and low-income customers. See 47 C.F.R. § 54.706(c). The percentage of revenues that a carrier must contribute to the USF is established by the FCC and adjusted on a quarterly basis to ensure sufficient funding of the USF. *Id.* § 54.709(a).

The FCC has authorized carriers to recover the costs of their contributions to the USF from their customers through the rates they charge for telecommunications services or as a separate itemized charge. See *In re Federal-State Joint Bd. on Universal Serv.*, Report & Order & Second Notice of Proposed Rulemaking, 17 F.C.C.R. 24952, ¶ 42 (Dec. 13, 2002) ("Dec. 2002 Order"); Pet. App. 3a. BellSouth has always recovered its costs related to its contributions to the USF as a separate line-item placed on its customers' monthly phone bills and delineated as the "Federal Universal Service Charge" ("FUSC").[1] 4th Cir. J.A. at 159.

In an order released in December 2002, the FCC adopted rules, to be effective on April 1, 2003, that prohibited carriers from "marking up" their USF line items and charging customers more than their *pro rata* assessment amount. Dec. 2002 Order, ¶¶ 51-52. Although BellSouth has never "marked up" its charge to recover an amount in excess of its contribution, prior to this date the practice of marking up USF line items was permitted by the FCC and did not render such charges unjust or unreasonable. Specifically, before the

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[1] The FCC indicated that it does not "mandate a specific label for federal universal service line items pursuant to our Truth-in-Billing rules," Dec. 2002 Order, ¶ 65, although it tentatively approved use of BellSouth's term. See *In re Truth-in-Billing and Billing Format*, First Report & Order & Further Notice of Proposed Rulemaking, 14 F.C.C.R. 7492, ¶72 (May 11, 1999) ("Truth-in-Billing Order").

December 2002 Order, "[t]he Commission required only that contributors not shift more than an equitable share of their contributions to any customer or group of customers, and that contributors provided accurate, truthful, and complete information regarding the nature of the charge." *Id.* ¶ 10.

B. BellSouth's FCC Tariff Discloses its FUSC Methodology and Terminology.

The amount of BellSouth's FUSC, how the charge is calculated, and how it appears on customers' bills are detailed in BellSouth's federal tariff, duly filed with the FCC. 4th Cir. J.A. at 159. BellSouth's March 18, 2002 tariff, for instance, contains a page headed, "CALCULATION OF 2nd QUARTER 2002 BELLSOUTH UNIVERSAL SERVICE FUND (USF) CONTRIBUTION." *Id.* at 165. The page describes each step in calculating the amount that BellSouth contributes to the USF. *Id.* The following page in the tariff is titled, "CALCULATION OF 2nd QUARTER 2002 BELLSOUTH FEDERAL UNIVERSAL SERVICE CHARGE." *Id.* at 166. This page explains step-by-step how BellSouth arrives at the FUSC it charges to its customers and also provides BellSouth's annualized contribution to the USF. *Id.*

C. District Court Proceedings.

Petitioner Tomi White Bryan filed this putative class action against BellSouth on February 22, 2002, in the General Court of Justice, Superior Court Division, Guilford County, North Carolina. Pet. App. 28a. Pursuant to 28 U.S.C. § 1331 and § 1441, BellSouth removed the case to the United States District Court for the Middle District of North Carolina on the ground that, despite their state-law labels, petitioner's claims arose under federal law because petitioner was in actuality challenging the terms of BellSouth's federal tariff. Pet. App. 32a. BellSouth filed its answer on April 2, 2002.

On June 4, 2002, petitioner filed her first amended complaint ("complaint"). On behalf of a class of persons and

entities that paid the FUSC,[2] she asserted purported state-law causes of action for violation of the North Carolina Unfair and Deceptive Trade Practices Act, N.C. Gen. Stat. § 75-1.1, unjust enrichment/restitution, and breach of contract (including the covenant of good faith and fair dealing) in connection with the FUSC charges on her monthly phone bill. Pet. App. 30a. Petitioner claimed that BellSouth's FUSC was excessive because it exceeded BellSouth's required contributions to the USF. *Id.* at 4a, 33a-35a. Petitioner further alleged that BellSouth did not disclose how it calculated the FUSC, and that BellSouth misled its customers into believing that the government mandated that BellSouth collect the FUSC from its customers. *Id.* at 35a.

On June 10, 2002, petitioner filed a motion to remand pursuant to 28 U.S.C. § 1447(c). Pet. App. 29a. On July 3, 2002, BellSouth filed a motion to dismiss all claims in the complaint on several grounds, including the fact that the claims were barred by the filed-rate doctrine. *Id.* at 37a.

On February 6, 2003, the district court denied petitioner's motion to remand under 28 U.S.C. § 1447(c) and granted in part BellSouth's motion to dismiss. Pet. App. 40a-41a. The court found removal proper because petitioner's claim that the FUSC was excessive presented a federal question by directly challenging the terms of BellSouth's filed tariff. *Id.* at 33a-35a. The court then dismissed the claims it concluded arose under federal law pursuant to the filed-rate doctrine. *Id.* at

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[2] Specifically, the complaint defined the class as: "All persons or entities in North Carolina who were billed for and paid a Federal Universal Service Charge to BellSouth after detariffing went into effect." 4th Cir. J.A. at 19. The FCC, however, has not detariffed the "access" services at issue in this action, see 47 C.F.R. § 69.3, and at all relevant times the FUSC has been included in BellSouth's filed FCC tariff. See *supra*, at 3. By contrast, the FCC has detariffed other services, including (for example) long-distance services. See *MCI WorldCom, Inc.* v. *FCC*, 209 F.3d 760 (D.C. Cir. 2000).

37a-38a. The court, however, found that petitioner's claim for unfair and deceptive trade practices (count A of the complaint) arose under state law. *Id.* at 38a. The court declined to exercise supplemental jurisdiction over the remaining state-law claim and remanded that claim to state court pursuant to 28 U.S.C. § 1367(c)(3).[3] *Id.* at 39a. BellSouth appealed the district court's ruling to the Fourth Circuit.[4]

D. The Fourth Circuit's Decision.

On July 28, 2004, a divided panel of the Fourth Circuit vacated the district court's decision. The court first rejected petitioner's argument that it had no jurisdiction to hear the appeal, finding that the district court's remand order under 28 U.S.C. § 1367(c) constituted an appealable final order. Pet. App. 8a. Turning to the merits of BellSouth's appeal, the court concluded that, read in the light most favorable to petitioner, the complaint seeks a refund of a portion of the FUSC petitioner has paid to BellSouth. *Id.* at 14a. Because the FUSC is set forth in the tariff BellSouth filed with the FCC, which carries the force of federal law, the Fourth Circuit held that an action to alter that rate necessarily requires resolution of a "'substantial question of federal law'" and therefore presents a federal question. *Id.* at 9a, 16a (quoting *Franchise Tax Bd.* v. *Constr. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983)). Moreover, because granting

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[3] The district court did not explicitly state which claims arose under federal law, and therefore were subject to dismissal, and which claim arose under state law. Rather, the court simply stated that petitioner's "remaining state law claims" should be remanded to state court. Pet. App. 39a. Before the Fourth Circuit, the parties agreed that the court's order had the effect of dismissing petitioner's unjust enrichment/restitution and breach of contract claims, while remanding the unfair and deceptive trade practices claim. *Id.* at 6a n.4.

[4] Petitioner did not appeal the district court's dismissal of her claims for unjust enrichment/restitution and breach of contract. Pet. App. 6a n.4.

petitioner relief on her claim would require the court to order a refund of a portion of the tariffed rate and to determine a reasonable rate for the FUSC different from that set forth in the tariff, the court concluded that the claim should be dismissed pursuant to the filed-rate doctrine. *Id.* at 16a. Accordingly, the Fourth Circuit "vacate[d] the district court's Order with respect to Count A and remand[ed] for that count to be dismissed."[5] *Id.*

In dissent, Judge Luttig agreed with the majority that "claims requiring the court to second-guess the reasonableness" of the rate set forth in the tariff "are properly said to require the court to resolve a substantial federal question," permitting exercise of federal-question jurisdiction. *Id.* at 23a. Judge Luttig, however, asserted that petitioner's damages could be measured without implicating the reasonableness of the tariffed rate. *Id.* at 24a. The dissent thought that petitioner's complaint could plausibly be read to assert a theory of recovery not implicating the filed tariff by measuring damages as the difference between BellSouth's FUSC and the FUSC for the carrier petitioner would have chosen but for BellSouth's alleged misrepresentations. *Id.* at 25a. Therefore, according to the dissent, the claim did not necessarily depend on a substantial question of federal law and was properly remanded.

On August 24, 2004, the Fourth Circuit denied petitioner's motion for rehearing and rehearing *en banc*, with no recorded dissent. *Id.* at 42a.

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[5] Because the Fourth Circuit ordered petitioner's state-law claim dismissed on the basis that it challenged BellSouth's filed tariff, it did not address BellSouth's alternative arguments that (1) her non-disclosure allegations were barred by the filed-rate doctrine for the additional reason that, under that doctrine, she is presumed to know the contents of the tariff, and (2) the FCC had primary jurisdiction over the allegations in the complaint. Pet. App. 16a n.11.

REASONS FOR DENYING THE PETITION

Petitioner has failed to provide adequate justification for this Court to review any of the three questions asserted in her petition. *First*, she asserts that the Fourth Circuit incorrectly determined it had appellate jurisdiction to review a remand order entered pursuant to the supplemental jurisdiction statute, 28 U.S.C. § 1367(c)(3). However, petitioner does not (and cannot) claim there is a circuit split on this question. Indeed, those circuits which have addressed the issue all agree with the Fourth Circuit's conclusion that a court of appeals may review such an order. Moreover, petitioner's argument that 28 U.S.C. §1447(c) applies and bars appellate review is inconsistent with this Court's decision in *Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996).

Second, petitioner asserts that this Court should review the "important question[]" of "[t]he scope of federal question jurisdiction based on a preemption defense." Pet. 7. Specifically, petitioner contends that the Fourth Circuit's ruling is in conflict with the decisions of other circuits, which reject application of the complete preemption doctrine in the telecommunications context. However, the Fourth Circuit did not base its conclusion that the district court had subject-matter jurisdiction on complete preemption, but instead on the existence of a substantial question of federal law. The court's ruling is consistent with the decisions of this Court and the other circuits. At most, therefore, petitioner seeks review of the Fourth Circuit's fact-bound decision that resolution of petitioner's complaint would in fact require determination of a substantial federal claim. That question, involving consideration of this petitioner's particular complaint, plainly does not warrant this Court's review. The Fourth Circuit, moreover, correctly found that the complaint necessarily raises an important federal question.

Third, petitioner asserts that the Fourth Circuit improperly expanded the filed-rate doctrine. Petitioner, however,

fundamentally misconstrues this Court's opinion in *AT&T Co.* v. *Central Office Telephone, Inc.*, 524 U.S. 214 (1998), on which she bases her argument. Both *Central Office* and cases from other circuits are fully consistent with the Fourth Circuit's conclusion that petitioner's claim is barred by the filed-rate doctrine.

For these reasons, as explained more fully below, the petition should be denied.

I. CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS, THE FOURTH CIRCUIT HAD JURISDICTION OVER THE APPEAL.

Petitioner first seeks review of the Fourth Circuit's holding that it had appellate jurisdiction. Pet. 9-10. As explained above, the district court's decision to remand to state court petitioner's state-law claim was based on the supplemental jurisdiction statute, 28 U.S.C. § 1367(c)(3), not 28 U.S.C. § 1447(c).[6] Petitioner presents no reason justifying this Court's review of the Fourth Circuit's jurisdictional holding. Nor does she demonstrate that the Fourth Circuit's decision was erroneous.

Petitioner does not claim that there is a circuit split on the question whether a court of appeals has jurisdiction to review a remand order entered pursuant to 28 U.S.C. § 1367(c)(3). Indeed, the Fourth Circuit's decision below is consistent with that of every other circuit that has addressed this question. Four other circuits have expressly held that a district court's order, pursuant to 28 U.S.C. § 1367(c)(3), remanding state

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[6] Section 1367(c)(3) provides the district court with discretion to decline to exercise supplemental jurisdiction over state-law claims after it dismisses all federal claims. That provision governs actions removed to federal court from state court as well as actions initially filed in federal court. Section 1447(c), which applies only to removed cases, directs that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."

law claims after dismissal of all federal claims is reviewable on appeal. See *Hill* v. *Bellsouth Telecomms., Inc.*, 364 F.3d 1308, 1314 (11th Cir. 2004); *In re U.S. Healthcare, Inc.*, 193 F.3d 151, 159 (3d Cir. 1999), *cert. denied*, 530 U.S. 1242 (2000); *Gaming Corp. of Am.* v. *Dorsey & Whitney*, 88 F.3d 536, 542 (8th Cir. 1996); *Pacificare of Okla., Inc.* v. *Burrage*, 59 F.3d 151, 152-53 (10th Cir. 1995). Five additional circuits, while not expressly addressing the jurisdictional question, have heard appeals of remand orders without commenting on their own jurisdiction and thus implicitly held that a district court's remand pursuant to 28 U.S.C. § 1367(c) is reviewable.[7] See *Nethersole* v. *Bulger*, 287 F.3d 15, 17 (1st Cir. 2002); *Miller Aviation* v. *Milwaukee County Bd. of Supervisors*, 273 F.3d 722, 727-28 (7th Cir. 2001); *Brown* v. *Lucky Stores, Inc.*, 246 F.3d 1182, 1187 (9th Cir. 2001); *Weeks* v. *Portage County Exec. Offices*, 235 F.3d 275, 279-80 (6th Cir. 2000); *Noble* v. *White*, 996 F.2d 797, 800 (5th Cir. 1993). Given the overwhelming uniformity in the circuits, review by this Court plainly is not warranted.

Moreover, the Fourth Circuit's holding is perfectly consistent with this Court's precedents. Petitioner claims that 28 U.S.C. § 1447(d) barred appellate review in these circumstances.[8] Pet. 9-10. But as this Court explained in *Quackenbush*, "'only remands based on grounds specified in § 1447(c) are immune from review under § 1447(d).'" 517 U.S. at 712 (quoting *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 127 (1995), and *Thermtron Prods., Inc.* v.

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[7] The federal courts of appeals are under an obligation to ensure that they have subject matter jurisdiction over an appeal and to raise their lack of jurisdiction *sua sponte*, if necessary. See *Things Remembered, Inc.* v. *Petrarca*, 516 U.S. 124, 131 n.1 (1995) (Ginsburg, J., concurring); *Mansfield, C. & L.M. Ry. Co.* v. *Swan*, 111 U.S. 379, 384 (1884).

[8] Section 1447(d) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. . . ."

Hermansdorfer, 423 U.S. 336, 345-46 (1976)). The district court below did not remand count A to state court based on § 1447(c), but based on § 1367(c)(3). Pet. App. 8a. For this reason, *Quackenbush* establishes that the bar on appellate review in § 1447(d) does not apply.

Petitioner's confused effort to demonstrate that the district court's dismissal was in fact based on § 1447(c) should be rejected. Section 1447(c) requires a remand whenever "it appears that the district court lacks subject matter jurisdiction." Petitioner seems to suggest that, after dismissal of her federal claim, the district court below lacked subject matter jurisdiction over her remaining state claim. Petitioner is wrong. The district court's subject matter jurisdiction, of course, was determined at the time the complaint was filed. See, *e.g.*, *Grupo Dataflux* v. *Atlas Global Group, L.P.*, 124 S. Ct. 1920, 1924 (2004). The district court held, in a determination petitioner has not challenged on appeal, that two of her claims arose under federal law. Pet. App. 33a-35a. That court, therefore, had federal-question jurisdiction over petitioner's federal claims and supplemental jurisdiction over her state-law claim. See 28 U.S.C. §§ 1331, 1367(a); *United Mine Workers of Am.* v. *Gibbs*, 383 U.S. 715, 725 (1966).[9] Contrary to petitioner's implication, the district court did not lose subject matter jurisdiction over the state-law claim upon dismissal of the federal claims. As the courts of appeals uniformly have held, a district court retains Article III jurisdiction over non-diverse, supplemental state-law claims

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[9] To be sure, "[t]he federal claim must have substance sufficient to confer subject matter jurisdiction on the court." *Gibbs*, 383 U.S. at 725. Although petitioner's federal claims ultimately were dismissed, neither petitioner nor either court below has suggested that they were so insubstantial that they could not support the district court's federal question jurisdiction. See *Bell* v. *Hood*, 327 U.S. 678, 682-83 (1946) ("[A] suit may sometimes be dismissed for want of jurisdiction where the alleged claim . . . is wholly insubstantial and frivolous.").

even after federal-question claims are dismissed. See, *e.g.*, *United Int'l Holdings, Inc.* v. *The Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1220 (10th Cir. 2000), *aff'd on other grounds*, 532 U.S. 588 (2001); *Roche* v. *John Hancock Mut. Life Ins. Co.*, 81 F.3d 249, 256-57 (1st Cir. 1996); *New Rock Asset Partners* v. *Preferred Entity Advancements, Inc.*, 101 F.3d 1492, 1505 (3d Cir. 1996).

Finally, petitioner claims (Pet. 10) that the "Congressional intent and policy reasons" underlying the bar on appellate review of remand orders in § 1447(d) apply as well to appellate review of remand orders pursuant to § 1367(c)(3). That argument, however, is directly contrary to *Quackenbush*, which held that Congress specifically limited § 1447(d) to remands pursuant to § 1447(c), and did not intend to subject *any* other remand orders to § 1447(d). See 517 U.S. at 711-12.

II. REVIEW OF THE FOURTH CIRCUIT'S HOLDING THAT THE DISTRICT COURT HAD SUBJECT-MATTER JURISDICTION IS NOT WARRANTED.

Petitioner asserts that the Fourth Circuit permitted BellSouth to remove the complaint "based on an ordinary preemption defense," and its decision therefore conflicts with court of appeals cases rejecting application of the complete preemption doctrine to claims related to the FCA. Pet. 8, 10-15. Contrary to petitioner's surprising argument, the Fourth Circuit *expressly* disclaimed reliance on the complete preemption doctrine, and found the existence of federal-question jurisdiction because petitioner's claim required resolution of a substantial federal question. Thus, the Fourth Circuit's decision is wholly consistent with applicable precedent. At most, therefore, petitioner merely quarrels with the Fourth Circuit's reading of the complaint.

A. Because The Fourth Circuit Did Not Base Its Decision On Complete Preemption, Petitioner's Purported Circuit Split Is Illusory.

Petitioner asserts that certiorari should be granted because the Fourth Circuit's opinion conflicts with the decisions of other circuits finding that there is no federal-question jurisdiction based on complete preemption of deception claims regarding the billing practices of telecommunications providers. Pet. 8, 10-15. Complete preemption exists where the preemptive force of a statute is so powerful that even if a claim is pleaded solely in terms of state law, it in reality will be deemed based in federal law and subject to federal jurisdiction. See, *e.g.*, *Beneficial Nat'l Bank* v. *Anderson*, 539 U.S. 1, 6-8 (2003); *Fax Telecommunicaciones Inc.* v. *AT&T*, 138 F.3d 479, 486 (2d Cir. 1998). BellSouth does not dispute petitioner's assertion that "'a case may *not* be removed to federal court on the basis of a federal defense, including the defense of pre-emption, even if the defense is anticipated in the plaintiff's complaint . . . .'" Pet. 11 (quoting *Caterpillar, Inc.* v. *Williams*, 482 U.S. 386, 393 (1987) (emphasis in original)). Likewise, BellSouth has no quarrel with petitioner's contention that "[t]he majority of courts that have addressed preemption in the wire-line context have held that Congress did not intend the FCA to completely preempt state law claims so as to make them removable." *Id.* at 12.

Petitioner's entire discussion is beside the point, however, because the Fourth Circuit did not base its decision on the complete preemption doctrine. Indeed, the court explained that "[b]ecause . . . Bryan's cause of action presents a substantial question of federal law, we *need not determine* whether the doctrine of complete preemption applies."[10] Pet.

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[10] See also Pet. App. 18a (Luttig, J., dissenting) ("Because the majority finds jurisdiction [based on a substantial question of federal law], it does not address the question of whether complete preemption is present.").

App. 10a n.5 (emphasis added); see also *id.* at 10a n.6. Petitioner therefore simply errs in asserting that "[t]he Court of Appeals found federal question jurisdiction based on a preemption defense." Pet. 10. Thus, the conflict among the circuits claimed by petitioner (Pet. 7, 12) is wholly illusory. The cases on which she relies merely hold that federal jurisdiction over claims of deception concerning a telephone company's billing practices cannot be based on complete preemption. See *Freeman* v. *Burlington Broadcasters, Inc.*, 204 F.3d 311, 317 (2d Cir. 2000); *Fax Telecommunicaciones*, 138 F.3d at 486; *Russell* v. *Sprint Corp.*, 264 F. Supp. 2d 955, 960 n.1 (D. Kan. 2003).[11] None of these cases addressed the actual basis on which the Fourth Circuit found federal-question jurisdiction.

B. The Fourth Circuit Correctly Found Jurisdiction Because The Complaint Required Determination Of A Substantial Federal Question.

1. As this Court has held, quite apart from complete preemption, federal subject-matter jurisdiction exists when "a well-pleaded complaint establishes . . . that the plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law."[12] *Franchise Tax Bd.* v.

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[11] *In re Long Distance Telecomms. Litig.*, 831 F.2d 627, 633 (6th Cir. 1987), on which petitioner also relies (Pet. 7, 12), involved ordinary preemption, and did not discuss complete preemption or any other jurisdictional doctrine.

[12] Citing *Beneficial National Bank* v. *Anderson*, *supra*, petitioner asserts that the "viability" of this basis for federal jurisdiction "is tenuous at best." Pet. 12. *Anderson* provides no basis for questioning the longstanding principle that there is federal-question jurisdiction when a state-law claim necessarily "depends on resolution of a substantial question of federal law." *Franchise Tax Bd.*, 463 U.S. at 28. *Anderson* involved the complete preemption doctrine and did not discuss the alternative basis for federal jurisdiction found by the Fourth Circuit below. Nor has petitioner cited any authority for her suggestion that *Anderson*

Constr. Laborers Vacation Trust, 463 U.S. 1, 27-28 (1983). The Fourth Circuit plainly based its finding of federal-question jurisdiction on this principle. Pet. App. 12a ("In sum, we must determine whether Count A of the Complaint would require the court to determine a reasonable rate for the FUSC, thereby presenting a substantial question of federal law . . ."). Petitioner has suggested no reason why this issue is worthy of this Court's review.[13]

Indeed, the Fourth Circuit's holding is consistent with decisions of other courts of appeals. The circuits uniformly recognize that tariffs filed pursuant to federal statutes carry the force of federal law and are not mere contracts. See, *e.g.*,

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undermined this alternative basis for federal jurisdiction. Indeed, since *Anderson*, federal courts have continued to base jurisdiction on the presence of a substantial federal question. See, *e.g.*, *Metheny* v. *Becker*, 352 F.3d 458, 460 (1st Cir. 2003); *In re Wireless Tel. Radio Frequency Emissions Prods. Liab. Litig.*, 327 F. Supp. 2d 554, 567 n.18 (D. Md. 2004).

[13] The Court should not hold the petition pending the decision in *Grable & Sons Metal Products, Inc.* v. *Darue Engineering & Manufacturing*, No. 04-603. In *Grable*, this Court presumably granted certiorari to resolve a circuit split on the question whether removal jurisdiction under *Franchise Tax Board* could be premised on a federal statute that did not provide an applicable private right of action. Compare *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 377 F.3d 592 (6th Cir. 2004), *cert. granted*, No. 04-603, with *Seinfeld* v. *Austen*, 39 F.3d 761 (7th Cir. 1994), *cert. denied*, 514 U.S. 1126 (1995). There are two reasons why this case does not involve the question at issue in *Grable*. First, the FCA indisputably grants petitioner a private right of action for the state-law violation alleged in count A of her complaint. See 47 U.S.C. §§ 206-207. Thus, the Fourth Circuit's decision is correct no matter how *Grable* is decided. Second, this is not a case (such as *Grable* and *Seinfeld*) where the court merely would be required to interpret and apply federal law. Rather, because a federal tariff has the force and effect of federal law (see *infra*, at 14-15), petitioner in effect seeks to *invalidate* federal law. Federal-question jurisdiction clearly lies with respect to such a claim. See *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 534-35 (1983); *Louisville & Nashville R. Co.* v. *Rice*, 247 U.S. 201, 203 (1918).

Marcus v. *AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998); *Cahnmann* v. *Sprint Corp.*, 133 F.3d 484, 488 (7th Cir.), *cert. denied*, 524 U.S. 952 (1998); *W. Union Int'l, Inc.* v. *Data Dev., Inc.*, 41 F.3d 1494, 1496 (11th Cir. 1995); *MCI Telecomms. Corp.* v. *Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992); see also *Central Office*, 524 U.S. at 227 ("'The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.'") (quoting *Keogh* v. *Chicago & Northwestern R. Co.*, 260 U.S. 156, 163 (1922)). This Court has found that suits to enforce or invalidate as unreasonable a federal tariff arise under federal law. *Thurston Motor Lines, Inc.* v. *Jordan K. Rand, Ltd.*, 460 U.S. 533, 534-35 (1983); *Louisville & Nashville R. Co.* v. *Rice*, 247 U.S. 201, 203 (1918). Applying this principle, the courts of appeals repeatedly have found federal-question jurisdiction with respect to state-law claims challenging or involving tariffed rates, particularly in the telecommunications context. See, *e.g.*, *Hill*, 364 F.3d at 1315-17 (finding state law causes of action for fraud and unfair trade practices raised substantial questions of federal law pursuant to a filed tariff and therefore federal-question jurisdiction attached); *C.A.R. Transp. Brokerage Co.* v. *Darden Rests., Inc.*, 213 F.3d 474, 478 (9th Cir. 2000) (any action arising from filed tariff presents federal question); *Marcus*, 138 F.3d at 56 (claim based on filed tariff arises under federal law); *Cahnmann*, 133 F.3d at 486, 488-89 (finding claim challenging tariff provision arose under federal law, even though complaint did not allege any violation of federal law); *Del. & Hudson Ry. Co.* v. *Offset Paperback Mfrs., Inc.*, 126 F.3d 426, 427 (2d Cir. 1997) (actions to enforce filed rates in tariff may be brought in federal court because tariffs have force and effect of federal statute); *MCI Telecomms. Corp.* v. *Teleconcepts, Inc.*, 71 F.3d 1086, 1093-94 (3d Cir. 1995) (claims relying on tariff filed with FCC are subject to federal jurisdiction), *cert. denied*, 519 U.S. 815 (1996); *MCI Telecomms. Corp.* v. *Graham*, 7 F.3d 477, 479 (6th Cir. 1993) (claim to enforce provisions of tariff are

premised on federal law); *Garden State*, 981 F.2d at 386, 388 (finding federal subject matter jurisdiction existed over claim arising under tariff required by FCA, even though complaint did not allege specific violation of Act).

2. The Fourth Circuit's decision is correct under these cases. Petitioner seeks damages for the alleged misrepresentations made by BellSouth regarding its assessment of the FUSC. The Fourth Circuit concluded that "the only plausible reading of the Complaint is that Count A . . . seeks a refund of a portion of the FUSC." Pet. App. 16a. As a result, the court reasoned, petitioner's claim necessarily would "require the court to determine a reasonable rate for the FUSC, thereby presenting a substantial question of federal law." *Id.* at 12a.

Petitioner asserts that the Fourth Circuit's holding "enables all state law claims to be removed based on an ordinary preemption defense." Pet. 8. That assertion is plainly wrong. The Fourth Circuit's holding by its terms applies only when a state-law claim *necessarily* seeks a refund of a payment required by a *federal tariff*, which is the equivalent of federal law. This holding simply has no application in other circumstances.

Petitioner also contends that the Fourth Circuit erred because the complaint does not in fact seek a refund of the tariffed rate, and that, for there to be federal jurisdiction, this remedy must be sought "on the face of the complaint itself." Pet. 12-13. But with this argument petitioner seeks mere correction of error that does not justify this Court's review. She also is wrong. The Fourth Circuit explained why the complaint seeks a refund of the tariffed rate:

> "the Complaint—read in the light most favorable to the plaintiff—nowhere purports to seek any form of damages other than a refund of some portion of the FUSC. And it pleads no facts that would put BellSouth on notice that Bryan intends to seek damages resulting

from any injury other than paying the FUSC."

Pet. App. 14a. Put simply, a plain reading of the complaint makes clear that petitioner seeks the precise relief she now disclaims. Moreover, even if the complaint by its terms does not demand a refund of the tariffed rate, any damages awarded to petitioner would effectively lower the tariffed rate in a manner inconsistent with federal law. See, *e.g.*, Pet. App. 11a; *Hill*, 364 F.3d at 1316; *Wegoland Ltd.* v. *NYNEX Corp.*, 27 F.3d 17, 21 (2d Cir. 1994); *Taffett* v. *Southern Co.*, 967 F.2d 1483, 1499-92 (11th Cir.), *cert denied*, 506 U.S. 1021 (1992).

3. In his dissent, Judge Luttig agreed that, under *Franchise Tax Board*, "a state law claim can 'arise under' federal law . . . 'if a well-pleaded complaint establishe[s] . . . that [the plaintiff's] right to relief under state law necessarily depends on resolution of a substantial question of federal law.'" Pet. App. 17a-18a (quoting *Franchise Tax Bd.*, 463 U.S. at 27-28). He also acknowledged that BellSouth's tariffs "represent a judgment by the government that the FUSC rates included therein are reasonable," and therefore "claims requiring the court to second-guess the reasonableness of this determination are properly said to require the court to resolve a substantial federal question." *Id.* at 23a. Where Judge Luttig parted company with the majority was his interpretation of the *complaint*. In particular, he believed that the complaint could be read as setting forth a "theory of liability" that "does not require resort to any concept of federal law." *Id.* at 26a. Resolution of the dispute between the panel majority and the dissent on the *factual* question of the meaning of the complaint manifestly does not require this Court's review.[14]

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[14] To the extent that Judge Luttig (Pet. App. 23a-24a) also disagreed with the majority's holding that a state-law claim seeking a refund of a

III. THERE IS NO CONFLICT AMONG THE CIRCUITS OR OTHER GROUNDS WARRANTING REVIEW OF THE FOURTH CIRCUIT'S DETERMINATION THAT PETITIONER'S CLAIM IS BARRED BY THE FILED-RATE DOCTRINE.

Finally, petitioner also asks this Court to review the Fourth Circuit's determination that count A of her complaint is barred by the filed-rate doctrine. She asserts that the decision below conflicts with *Central Office* (Pet. 8, 15-16) and with lower-court decisions (*id.* at 17-18). Petitioner's asserted justifications for this Court's review are without merit, as the Fourth Circuit's opinion is wholly consistent with *Central Office* and there is no conflict among the circuits about the application of the filed-rate doctrine in circumstances such as those here. Moreover, the Fourth Circuit's holding that petitioner's claim was barred by the filed-rate doctrine is manifestly correct.

A. The Fourth Circuit's Decision Is Consistent With *Central Office*.

Petitioner first contends that the Fourth Circuit's filed-rate doctrine holding is inconsistent with *Central Office*. The petition, however, is essentially devoid of explanation for *why* petitioner believes that this is so. Her discussion consists of a scant two paragraphs, one summarizing the facts of the case and this Court's holding, and the other containing a long quotation from the Chief Justice's concurring opinion in the case. Pet. 15-16. In his concurring opinion, the Chief Justice simply noted that the filed-rate doctrine "pre-empt[s] only those suits that seek to alter the terms and conditions provided for in the tariff." *Central Office*, 524 U.S. at 229 (Rehnquist, C.J., concurring).

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federally tariffed rate would raise a federal question, the courts of appeals uniformly disagree with him. See *supra*, at 15-16.

Whatever petitioner's argument might be, the decision below is perfectly consistent with *Central Office*. In *Central Office*, a reseller of long-distance telephone services sued AT&T on a state-law breach of contract claim. 524 U.S. at 216. According to the reseller, AT&T had promised it certain service and billing options in addition to those set forth in AT&T's federal tariff. *Id.* at 220. This Court found the claim barred by the filed-rate doctrine. The Court explained that, under the doctrine, "'the rate of the carrier duly filed is the only lawful charge.'" *Id.* at 222 (quoting *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U.S. 94, 97 (1915)). "Thus, even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff." *Id.* The filed-rate doctrine applies whether the customer seeks to vary the tariffed rate via a claim sounding in contract or in tort. *Id.* at 227.

The plaintiff in *Central Office* sought to avoid the filed-rate doctrine by arguing that its claims related not to the rates charged but to billing and the provisioning of services. *Id.* at 223. Rejecting this argument, the Court noted that rates "do not exist in isolation" and "have meaning only when one knows the services to which they are attached." *Id.* The FCA recognizes this reality by requiring the filed tariff to show not only charges but also "'the classifications, practices, and regulations affecting such charges'" and by making it unlawful to "'extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations, or practices affecting such charges' except those set forth in the tariff." *Id.* at 223-24 (quoting 47 U.S.C. § 203). The Court found that "privileges" barred by the FCA "come in many guises, and are not limited to discounted rates." *Id.* at 224. Thus, plaintiff's claims relating to additional service and billing options, even though couched in state-law terms and not directly challenging the tariffed rate, in fact pertained to subjects specifically

addressed by the filed tariff and involved privileges not included in the tariff. *Id.* at 224-26. The claims were therefore barred.

Applying these very principles (see Pet. App. 11a), the Fourth Circuit found petitioner's claim barred by the filed-rate doctrine. According to the court, petitioner's complaint sought a refund of a portion of the FUSC, which was a charge included in BellSouth's filed tariff. *Id.* at 14a-16a. The Fourth Circuit also concluded that her claim, "if successful, would require an award of damages that would have the effect of imposing different rates upon different customers," thereby representing the very preference barred by the filed-rate doctrine. *Id.* at 11a. Nothing in these conclusions is even remotely inconsistent with *Central Office*. Nor are they inconsistent with the Chief Justice's concurrence, which recognized that the doctrine bars claims—such as petitioner's—that "seek to alter the terms and conditions provided for in the tariff."[15] 524 U.S. at 229 (Rehnquist, C.J., concurring).

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[15] Petitioner asserts (Pet. 16) that the FUSC "is not a charge for any service provided by BellSouth to that customer." That claim is both wrong and beside the point. It is incorrect because, although a separate line item, it is a charge assessed on particular services BellSouth provides to its customers, as set forth in its tariff. Her claim is irrelevant because, as *Central Office* held, the filed-rate doctrine applies to all aspects of a carrier's tariff, not just its rate for a particular service. 524 U.S. at 223-26; see also *ICOM Holding, Inc.* v. *MCI Worldcom, Inc.*, 238 F.3d 219, 222 (2d Cir. 2001) ("In *Central Office*, the Court held that the filed-rate doctrine bars state-law claims not only that pertain directly to the *price* of telecommunications services subject to an FCC filing, but also state-law claims that concern various *nonprice* aspects . . . .") (emphasis in the original); *Telecom Int'l Am. Ltd.* v. *AT&T Corp.*, 280 F.3d 175, 193 (2d Cir. 2001) ("For purposes of the filed rate doctrine, discounted rates are not the only discriminatory and illegal 'privileges.'").

B. The Fourth Circuit's Decision Does Not Conflict With Other Court Of Appeals Decisions.

Petitioner asserts (Pet. 17) that the Fourth Circuit's decision conflicts with "a plethora of recent federal decisions holding that the filed-rate doctrine does not preempt state law claims for deception and misrepresentation which do not directly attack the *amount* of a filed rate" (emphasis in the original). But of the ten "recent federal decisions" cited by petitioner that supposedly conflict with the decision below, eight are district court cases. Of the two court of appeals cases cited by petitioner, *Freeman* v. *Burlington Broadcasters, Inc.*, *supra*, unlike the present matter, involved "claims that concern technical aspects of electronic transmissions," and simply noted that the complete preemption doctrine was inapplicable to state-law billing claims. 204 F.3d at 317. As explained above, jurisdiction in this case turns not on complete preemption, but on the existence of a substantial question of federal law. Moreover, as both the panel majority and the dissent agreed, the jurisdictional question is distinct from the application of the filed-rate doctrine. See Pet. App. 12a n.8; *id.* at 21a-22a (Luttig, J., dissenting).

The second court of appeals decision on which petitioner relies is *In re Long Distance Telecomms. Litig.*, 831 F.2d 627 (6th Cir. 1987)—a decision that pre-dated *Central Office* by more than a decade. *Long Distance* involved allegations that a phone service provider misrepresented its rates as lower than a competitor's without informing customers that, unlike its competitor, it charged them for uncompleted calls, ring time, and holding time—information *not* disclosed in the carrier's tariff. *Id.* at 628. The filed-rate doctrine obviously is irrelevant with respect to information not contained in the provider's tariff. Here, by contrast, petitioner's claim attacks

BellSouth's FUSC, which is explicitly set forth and described in the filed tariff.[16]

In fact, the court of appeals cases decided after *Central Office* consistently hold that a claim is barred by the filed-rate doctrine, even where it does not directly attack a filed rate, when an award of damages would effectively result in a judicial determination of the reasonableness of that rate. In *Evanns* v. *AT&T Corp.*, 229 F.3d 837 (9th Cir. 2000), *cert. denied*, 533 U.S. 911 (2001), for example, plaintiff brought a state-law claim asserting that AT&T made misrepresentations regarding the FUSC by failing to disclose that it was "pass[ing] through" its own assessment to its customers and that the charge was not required by the federal government. *Id.* at 840-41. The Ninth Circuit found that "[t]he filed-rate doctrine bars any claim, whether couched in terms of federal *or* state law, attacking . . . collection of the [FUSC] assessment in compliance with the terms of the filed tariffs." *Id.* at 841 (emphasis in original). Citing *Central Office*, the *Evanns* court held that since the FUSC was contained in the tariff, and plaintiff was charged with notice of the tariff,[17] plaintiff's claim that AT&T had an obligation to him beyond that set out in the filed tariff, such as disclosing that the FUSC was a pass-through charge, sought a "privilege" not provided

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[16] Despite the importance petitioner places on it (Pet. 18), *State ex rel. Nixon* v. *Nextel West Corp.*, 248 F. Supp. 2d 885 (E.D. Mo. 2003), is wholly inapposite. That district court case involved a suit by the Missouri attorney general against two cellular telephone service providers for deceptive advertising practices. *Id.* at 886. Unlike the services at issue here, cellular services are not governed by a federal tariff, see 47 C.F.R. § 20.15(c); *Orloff* v. *FCC*, 352 F.3d 415, 418-19 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 290 (2004), and the district court's decision therefore does not involve the filed-rate doctrine.

[17] Customers are "'conclusively presumed'" to have constructive knowledge of the terms of the filed tariff under which they receive telephone service. *Fax Telecommunicaciones*, 138 F.3d at 489 (quoting *Kansas City S. Ry. Co.* v. *Carl*, 227 U.S. 639, 653 (1913)).

to other AT&T customers and thus was barred as discriminatory pursuant to the filed-rate doctrine. *Id.* at 841 & n.21.

The Eleventh Circuit recently reached a similar holding in *Hill*, *supra*. In *Hill*, plaintiff brought claims seeking damages for BellSouth's alleged misrepresentations of the FUSC to its customers. 364 F.3d at 1312. The court found the claims violated the non-discrimination principles of the filed-rate doctrine. The court reasoned that even though plaintiff's claims did not attack the filed rate in so many words, she sought "'recovery of BellSouth's undisclosed charges in excess of its contributions to the [USF].'" *Id.* at 1316. Such an award of damages would in effect retroactively reduce the rate paid by plaintiff for telephone services to one below that paid by other BellSouth customers. Echoing *Evanns* and *Central Office*, the court found that the FUSC was part of the filed tariff, plaintiff was charged with notice of it, and allowing plaintiff to recover damages on a claim that BellSouth had a disclosure obligation beyond the disclosures already made in the tariff would award plaintiff the discriminatory "privilege" of receiving a discounted rate for telephone services compared to other BellSouth customers. See *id.* at 1316-17. Thus, even though the claims in effect challenged BellSouth's representations of the FUSC rather than the FUSC itself, granting plaintiff relief would effectively result in a finding that the original tariff rate was unreasonable, which is impermissible under the filed-rate doctrine. *Id.* at 1317.[18]

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[18] See also, *e.g.*, *Boomer* v. *AT&T Corp.*, 309 F.3d 404, 420 (7th Cir. 2002) (finding state-law claims challenging arbitration clause barred by filed-rate doctrine where some customers would be bound by clause and some would not be); *Fax Telecommunicaciones*, 138 F.3d at 491 (claim for damages based on misrepresentation of rates is barred by filed-rate doctrine, because such an award would lead to discrimination among customers and improperly undermine the regulatory authority of the

C. Petitioner's Claim Is Barred By The Filed-Rate Doctrine.

The Fourth Circuit correctly held that petitioner's claim is barred by the filed-rate doctrine. As the cases discussed above demonstrate (*supra*, at 22-23), any damages petitioner might recover *necessarily* would have the effect of reducing the tariffed rate petitioner paid for tariffed services, thereby constituting the very preference that the filed-rate doctrine prohibits. Moreover, BellSouth's tariff discusses in detail how BellSouth calculated its obligations to the USF and how it arrived at the amount of the FUSC charged to its customers. 4th Cir. J.A. at 165-66. Petitioner's claim that she was deceived fails under the filed-rate doctrine because customers are conclusively presumed to know the contents of the tariff.[19] See *Fax Telecommunicaciones*, 138 F.3d at 489; *Marco Supply Co.* v. *AT&T Communications, Inc.*, 875 F.2d 434, 436 (4th Cir. 1989).

Petitioner seeks to avoid the Fourth Circuit's holding by suggesting three reasons why her claim would not usurp the

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FCC); *Marcus*, 138 F.3d at 51, 60-63 (claims against long-distance carrier for false and misleading billing practices in not disclosing that it rounded up length of calls to next full minute were barred by filed-rate doctrine, because monetary damages requested would have the effect of challenging the filed rate).

[19] The FCA's savings clause does not exempt petitioner's claim from the filed-rate doctrine. That provision states that "[n]othing in this chapter contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." 47 U.S.C. § 414. This Court has found that the savings clause "preserves only those rights that are not inconsistent with the statutory filed-tariff requirements." *Central Office*, 524 U.S. at 227. Thus, this Court explained that claims "directly conflict[ing] with the tariff . . . cannot be 'saved' under § 414." *Id.*; see also *Evanns*, 229 F.3d at 840; *Cahnmann*, 133 F.3d at 488.

FCC's authority.[20] Relying on the FCC's December 2002 Order, she first claims that "[t]he FCC has already determined that USF mark-ups such as those imposed by BellSouth are unreasonable." Pet. 19; see also *id.* at 5, 14. This assertion is wrong. In the December 2002 Order, the FCC did not find that mark-ups on USF charges were "unreasonable" under 47 U.S.C. § 201(b). To the contrary, the FCC explained that it decided to prohibit mark-ups prospectively "in light of the modifications to the contribution methodology adopted" elsewhere in the December 2002 Order, and it specifically noted "the flexibility provided under our current rules" with respect to mark-ups. December 2002 Order, ¶¶ 45, 48. Moreover, petitioner's implication from the text of the order is contradicted by the fact that the FCC determined that the prohibition of mark-ups would take effect on April 1, 2003, almost five months after the December 2002 Order was issued. *Id.* It is inconceivable that the FCC would have permitted carriers to continue for five months a practice it "necessarily" found to be "unreasonable" and, as a result, a violation of § 201(b). Pet. 5.

Second, petitioner suggests that the FCC has indicated that "the filed-rate doctrine does not apply to [a carrier's] public disclosure requirements because those requirements are not part of the filed rate." Pet. 22 (citing *In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 14 F.C.C.R. 6004, ¶17 (Mar. 31, 1999) ("March 1999 Order")).

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[20] Petitioner also suggests that the Fourth Circuit's application of the filed-rate doctrine leaves consumers without a remedy for claims of deception by carriers. Pet. 7. Federal law, however, provides an ample remedy for carrier's unjust and unreasonable acts, including those related to disclosure and billing practices. See 47 U.S.C. §§ 206-207. In any event, as this Court has recognized, "the filed-rate doctrine may seem harsh in some circumstances," but "'it embodies the policy which has been adopted by Congress.'" *Central Office*, 524 U.S. at 222-23 (quoting *Maxwell*, 237 U.S. at 97).

Petitioner, however, misunderstands the FCC order on which she relies. Contrary to her suggestion, "public disclosure requirements" as used in that order refers not to information contained in tariffs filed with the FCC, but to documents filed by carriers who no longer file tariffs after the FCC "detariffed" long-distance service. See March 1999 Order, ¶¶ 1-3 & n.2. Moreover, petitioner's argument that the filed-rate doctrine applies only to "the amount to be charged, not the ancillary disclosures necessary to prevent deception of consumers" (Pet. 14) is refuted by the central holding of *Central Office*. See 524 U.S. at 221-26; see also *ICOM*, 238 F.3d at 222.

Third, petitioner implies that the FCC has determined that BellSouth's label for the charge it imposes on customers to recover its USF contributions—"Federal Universal Service Charge"—is misleading. Pet. 21-22. To the contrary, the FCC specifically approved this language. The FCC stated: "We tentatively conclude that the following labels would be appropriate: . . . 'Federal Universal Service' to describe line items seeking to recover from customers carriers' universal service contributions." Truth-in-Billing Order, ¶ 72. The FCC authorities cited by petitioner contain only the agency's general standards, not a ruling on the language used by BellSouth.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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